Chew Choo Sing @ Chiew Peng Ann v Chew Brothers Development Corporation Sdn Bhd & Ors

HIGH COURT (KUCHING) — ORIGINATING PETITION NO 1 OF 1990
DAVID WONG DAK WAH JC
30 MARCH 2007

Companies & Corporations — Winding up — Petition — Petition under s 181 — Allegations of oppressive conduct by petitioner against the second to fourth respondents — Whether substantiated — Whether petition to be granted — Companies Act 1965 s 181

Companies & Corporations — Winding up — Petition under s 181 — Whether the failure to give notice of meeting was a mere technicality — Whether the court could set aside a transaction under s 355 — Companies Act 1965

The petitioner was the eldest of four brothers. The petitioner filed a petition against the younger brothers under s 181 of the Companies Act 1965 ('the Act') for various relief including an order for accounts and inquiries of the respondents' affairs, an order to restore the directors' fee of RM2,000 each by the second to fourth respondents for the years 1986, 1987 and 1988, an order setting aside or varying the terms of each of the issue of convertible loan stock in the first respondent to Geok Kheng Nominee Sdn Bhd ('GKN'), an order setting aside or varying the allotment of 9,240 ordinary shares to GKN, an order restraining the second to fourth respondents from excluding the petitioner from future meetings of the Board of Directors and meetings of the first respondent, alternatively that the second to fourth respondents be ordered to purchase the shares of the petitioner at a price to be ascertained, or an order that the second to fourth respondents sell and transfer to the petitioner their shares in the first respondent at a price to be ascertained or an order that the first respondent company be wound up on the basis that it is just and equitable to do so. The second to fourth respondents in turn filed a civil suit against the petitioner for breach of an oral agreement to transfer his shares in Wah Tat Bank Bhd to the respondents. The petition and civil suit were jointly tried by the court.

Held, dismissing the petition with costs, setting aside the conversion exercise under s 355(3) and ordering the first respondent to repay the sum of RM462,000 to GKN, dismissing the civil suit with costs:

(1) The petitioner's main complaint was that he was not given any notices of board meetings and as such was shut out from participating in the affairs of the first respondent. The petitioner was however at all material times a director whose rights were the same as that of the younger brothers. He did not do anything from 1977 to 1988, which is a span of 11 years. His stand of a 'couldn't care

less' attitude was his own doing and choice and as such he cannot complain he was excluded from participation in the affairs in the first respondent (see paras 14, 16).

(2) Looking at the evidence in its totality, the court believed the evidence of the respondents that it was the petitioner who did not want to co-operate with the younger brothers in the running of the first respondent and the younger brothers were put in a spot when they could not include him in the management of the first respondent (see paras 16, 17).

(3) The second complaint relates to the manner in which the merger between Wah Tat Bank Bhd and CGLF was effected by the respondents and the use of the proceeds from the merger to fund the 1982 rights issue by Wah Tat Bank Bhd to the first respondent. The manner in which this was done was highly unusual. But the petitioner had not shown how his financial interests in the first respondent had been adversely affected by this exercise. For relief to be granted under s 181, the conduct of oppression must involve some prejudice to the member's pecuniary interests in the company whereas in the merger there was none (see para 18).

(4) The petitioner also complained of the sale of land to Wong Hieng Ling below market value. The petitioner was however unable to prove how the younger brothers gained personally from this transaction or how the petitioner's interests in the first respondent had been prejudiced by the sale (see para 20).

(5) The petitioner also complained of a loan of RM462,000 to the first respondent and the subsequent issue of convertible unsecured loan stock to GKN which was owned by the younger brothers. The failure to give notice to the petitioner of the meeting at which the conversion exercise was decided upon cannot be regarded as a mere technicality as the effect of the conversion exercise was the dilution of the petitioner's interest in the first respondent (see paras 31, 35).

(6) The petitioner's real and only complaint was the conversion exercise and not that he had been continually oppressed by his younger brothers in the affairs of the first respondent. They were lumped in together to buttress his case with the hope that the court would fulfill his desire to go his own way. For all the reasons above, the court finds that the petitioner had failed to make out a case under s 181 (see paras 37, 40).

(7) The claim by the younger brothers in the civil suit was that the petitioner had orally agreed to transfer part of his Wah Tat Bank Bhd shares to make up part of 30% to be sold to an intended bumiputra shareholder. It is trite law that for an agreement, oral or otherwise, to be concluded three certainties, namely, the parties, the price and the property, must be established. In this case, the intended bumiputra shareholder and the sale price had not been established. Further, it is inconceivable that the petitioner would leave all the negotiations to the younger brothers to deal with his Wah Tat Bank Bhd shares, given the relationship between them (see paras 49, 54, 55).

[Bahasa Malaysia summary

Pempetisyen adalah anak sulung daripada empat (4) adik-beradik. Pempetisyen memfailkan petisyen terhadap adik-adiknya di bawah s 181 Akta Syarikat 1965

('Akta tersebut') untuk pelbagai relief termasuklah perintah akaun-akaun dan siasatan berkenaan hal ehwal responden, perintah untuk memasukkan semula yuran pengarah setiap satu sebanyak RM2,000 bagi responden kedua sehingga keempat untuk tahun 1986, 1987 dan 1988, perintah untuk mengenepikan atau meminda setiap terma-terma berkenaan isu pinjaman saham boleh ubah dalam responden pertama kepada Geok Kheng Nominee Sdn Bhd ('GKN'), perintah untuk mengenepikan atau meminda pembahagian 9,240 saham-saham biasa kepada GKN, perintah menahan responden kedua sehingga keempat dari mengecualikan pempetisyen daripada mesyuarat-mesyuarat lembaga pengarah pada masa hadapan dan mesyuarat-mesyuarat dengan responden pertama, secara alternatifnya bahawa responden kedua sehingga keempat diperintahkan membeli saham-saham pempetisyen pada harga yang akan dipastikan, atau perintah bahawa responden kedua sehingga keempat menjual dan memindahmilik kepada pempetisyen saham-sahamnya dalam responden pertama pada harga yang akan dipastikan dan perintah bahawa syarikat responden pertama digulung atas sebab ia adalah adil dan saksama untuk berbuat demikian. Sebaliknya, responden kedua sehingga keempat memfailkan guaman sivil terhadap pempetisyen kerana memungkiri perjanjian lisan untuk memindahmilik saham-sahamnya dalam Wah Tat Bank kepada responden-responden. Kedua-deua petisyen dan guaman sivil telah dibicarakan oleh mahkamah.

Diputuskan, menolak petisyen dengan kos, mengenepikan perlaksanaan penukaran di bawah s 355(3) dan memerintahkan responden pertama membayar sejumlah RM462,000.00 to GKN, menolak guaman sivil dengan kos:

(1) Aduan utama pempetisyen adalah dia tidak diberikan sebarang notis mengenai mesyuarat lembaga pengarah dan dengan itu dihalang daripada mengambil bahagian dalam hal ehwal responden pertama. Walaubagaimanapun, pempetisyen pada setiap masa yang material adalah pengarah yang mempunyai hak-hak yang sama dengan adiknya. Dia tidak berbuat apa-apa dari tahun 1977 sehingga 1988 iaitu kira-kira 11 tahun lamanya. Pendiriannya adalah sikap 'kurang mengambil lebih perhatian' adalah perlakuannya dan pilihannya dan dengan itu tidak boleh mengadu bahawa beliau telah dikecualikan daripada penyertaannya dalam hal ehwal responden pertama.

(2) Melihat kepada keseluruhan keterangan, mahkamah percaya keterangan responden-responden bahawa adalah pempetisyen yang tidak mahu bekerjasama dengan adik-adiknya dalam menjalankan responden pertama dan adik-adiknya berada dalam keadaan di mana mereka tidak boleh memasukkannya dalam pengurusan responden pertama.

(3) Aduan kedua berkaitan dengan penggabungan antara Wah Tat Bank Berhad dan CGLF telah dibuat oleh responden-responden dan penggunaan hasil daripada penggabungan untuk membiaya isu 1982 hak-hak oleh Wah Tat Bank Bhd kepada responden pertama. Cara bagaimana ia dilakukan adalah

sesuatu yang agak luarbiasa. Tetapi pempetisyen tidak menunjukkan bagaimana kepentingan kewangannya dalam responden pertama telah menerima kesannya ekoran amalan ini. Bagi relief untuk diberikan di bawah s 181, perlakuan penindasan hendaklah melibatkan pejudis kepada kepentingan wang ahli-ahli dalam syarikat sedangkan ia tidak ada dalam penggabungan ini.

(4) Pempetisyen juga mengadu penjualan tanah kepada Wong Hieng Ling adalah di bawah nilai pasaran. Pempetisyen walaubagaimanapun tidak dapat membuktikan bagaimana adik-adiknya memperolehi keuntungan secara bersendiri daripada urusniaga atau bagaimana kepentingan pempetisyen dalam responden pertama telah diprejudiskan oleh penjualan itu.

(5) Pempetisyen juga mengadu berkenaan pinjaman sebanyak RM462,000.00 kepada responden pertama dan isu selanjutnya adalah pinjaman saham berubah-berubah tidak bercagar kepada GKN yang dimiliki oleh adiknya. Kegagalan untuk memberikan notis kepada pempetisyen berkenaan mesyuarat yang mana amalan penukaran telah diputuskan tidak boleh dianggap sebagai hanya isu teknikal memandangkan kesan-kesannya kepada amalan penukaran adalah pencairan kepentingan pempetisyen dalam responden pertama.

(6) Aduan sebenar pempetisyen adalah berkenaan perlaksanaan penukaran dan bukannya ia terus-menerus ditindas oleh adik-adiknya dalam hal ehwal responden pertama. Mereka telah bersama-sama untuk menyokong kesnya dengan harapan mahkamah akan memenuhi hasratnya untuk mengikut jalannya sendiri. Untuk semua sebab-sebab di atas, mahkamah mendapati pempetisyen telah gagal untuk menyatakan kesnya di bawah s 181.

(7) Tuntutan oleh adik-adiknya dalam guaman sivil adalah bahawa pempetisyen telah secara lisannya bersetuju untuk memindahkan sebahagian saham-saham Wah Tat Bank Bhd untuk menjadikannya 30% yang akan dijual kepada pemegang saham bumiputra. Ia adalah undang-undang tetap untuk perjanjian, lisan atau sebaliknya, untuk dimuktamadkan melalui tiga ketentuan, iaitu, pihak-pihak, harga dan hartanah, hendaklah dibuktikan. Dalam kes ini, bakal pemegang saham bumiputra dan harga jualan tidak dapat dibuktikan. Kemudiannya, ia tidak dapat dibayangkan bahawa pempetisyen akan meninggalkan kesemua perbincangan kepada adik-beradiknya berurusan dengan saham-saham Wah Tat Bank Bhd, memandangkan terdapat hubungan antara mereka.]

Notes

For cases on winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1220-1223.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chung Ching Chuen & Ors And Anor Appeal [1995] 2 MLJ 770 (refd)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 (refd)

Broadcasting Station 2GB Pty Ltd, Re (refd) (1964–5) NSWR 1648 (refd)
Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors [2007] 1 MLJ 508 (refd)
Kassim Holdings Sdn Bhd v Syarikat Gaya Timber Sdn Bhd Kota Kinabalu (unreported; Suit No K22–141–2003) (refd)
Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227 (refd)
Low Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd [2000] 5 MLJ 529 (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)
Yii Chee Ming v Teo Ah Khing @ Teo Cho Teck & Anor [2005] 5 MLJ 354 (refd)
Young v Ladies Imperial Club Ltd [1920] 2 KB 523 (refd)

Legislation referred to

Companies Act ss 167(3), (4), 181, 355(1), (2), (3)

Robert Lazar (Stephan Chung and Benedict Lim with him) (Stephen Robert & Wong) for the petitioner.
Chong Siew Chiang (George Lim with him) (Chong Brothers Advocates) for the respondents.

David Wong Dak Wah JC:

PROCEEDINGS

[1] By an order of the court dated 15 December 1995, three suits, namely originating petition No 1/1990 ('OP suit'), Suit 68/1993 ('suit 68/93') and Suit 26 of 1993 ('suit 26/93') were ordered to be jointly tried for reasons which will become obvious later. Suit 26/93 however was struck out by the Sibu High Court on 17 January 1995 on the ground, among others, that the plaintiffs there (one of which is the petitioner in the OP suit) did not come to court with clean hands and were guilty of laches in bringing the suit. The just-mentioned decision of the High Court was upheld by the Court of Appeal, which leaves this court with the OP suit and suit 68/93 to adjudicate.

[2] In the OP suit, the proceeding relates to an action by Mr Chew Choo Sing @ Chew Peng Ann, the petitioner and the oldest of the four brothers, pursuant to s 181 of the Companies Act('the CA'), on the ground that he had been oppressed as a director and shareholder of the first respondent, namely Chew Brothers Development Corporation Sendirian Berhad by the three respondents. In suit 68/93, the second, third and fourth respondents as plaintiffs took out an action against the petitioner in the OP suit as defendant for breach of an oral agreement in failing to transfer his portion of shares in Wah Tat Bank Bhd back to them.

[3] In this judgment, for convenience, the petitioner will be referred as 'Peng Ann' while the second, third and fourth respondents will be collectively referred to as 'the younger brothers' and individually by their names.

BACKGROUND OF THE DISPUTE

[4] The background to this dispute is accurately set out in the submission of counsel for Peng Ann under the heading 'backdrop to the dispute' and for convenience I reproduce it verbatim:

3.1 The petitioner and the second, third and fourth respondents are the male members of the Chew family, the sons of the late Chew Geok Lin, the patriarch and Teo Kheng Hua, the matriarch. Chronologically, the relevant events are as follows:

(a) The late Chew Geok Lin founded Wah Tat Bank Berhad ('the Bank') in 1929. The Bank was incorporated in 1955.

(b) The petitioner joined the Bank as a clerk in 1950 and became a Manager in 1960.

(c) In 1965 the father died and the petitioner then became the Managing Director whilst the matriarch assumed the chairmanship of the Bank.

(d) In 1968 the first respondent Company was incorporated. As its name suggests it was to be a company of the four Chew brothers. It was and is primarily a holding company owning investments in other companies and some landed assets. It was never an active trading company with a business activity of its own.

(e) It was only in 1974 that the first respondent became a shareholder in the Bank holding 12% of the Bank's share capital. The Bank can be aptly described as being more than just 'the jewel in the crown'.

(f) The mother passed away in 1974. The petitioner still continued to manage the Bank.

(g) In 1974, after the mother's death, the second respondent became co-Managing Director of the Bank. This continued until about 1976 when management of the Bank was assumed by the second respondent. The petitioner still remained a director of the Bank.

3.2 The differences between the petitioner and his younger brothers in the first respondent company manifested themselves in 1977 when the petitioner was removed as Chairman of the first respondent. He was allowed to remain as a director.

3.3 It is fair to say that from 1977 until 1981 nothing controversial in the first respondent took place. The contentious matters which form the basis of this Petition first occurred in 1982. It started off when there was a stipulation by Bank Negara Malaysia that called for the increase in the paid up capital of the Bank, which at that time was RM2m and which had to be increased to RM10 million by end February 1983. Although the respondents knew about such requirements in March 1982, the second, third and fourth respondents only spoke to the petitioner about these matters some time in December 1982.

3.4 (The petitioner's shares in Chew Geok Lin Finance ('CGLF') were held by him and other members of his family. In the Bank the petitioner himself held 3012 shares and his wife 230 shares thus totaling 3242. Besides the 4 brothers' holding 3242

shares in the Bank, the petitioner's son had 23 shares in his own right).

THE PETITION

[5] The relief prayed for in the petition is as follows:

(a) an order that all necessary accounts and inquiries be taken of the first respondent's affairs and each of the second, third, and fourth respondents to ascertain what sums of money the said respondents are liable to account for by reason of the breaches of duties owed to the first respondent;

(b) an order that the second, third and fourth respondents restore the director's fee of RM2,000 each which each of them received for the years 1986, 1987, 1988 and are still receiving such fees in breach of the first respondent's article of association;

(c) an order setting aside or otherwise varying the terms of each of the issues of convertible loan stock in the first respondent to Geok Kheng Nominee Sdn Bhd ('GKN') and authorised by the second, third and fourth respondents;

(d) an order setting aside or otherwise varying the allotment of 9,240 ordinary shares at par value of RM50 to GKN by the first respondent;

(e) an order that each of the second, third, and fourth respondent be restrained from excluding the petitioner from future meetings of the Board of Directors and Annual General Meetings and Extraordinary General Meetings of the first respondent and that the company secretary of the first respondent be directed to issue notices of such meetings to the petitioners;

(f) alternatively, an order that the second, third, and fourth respondents or any one or more of them whether singly or jointly as the case may be do purchase the shares of the petitioner at a price to be ascertained and for directions as to the manner and mode of valuation of the shares;

(g) alternatively an order that each of the second, third and fourth respondents do sell and transfer to the petitioner their respective shares in the first respondent company at a price to be ascertained and for directions as to the manner and mode of the valuation of the shares;

(h) alternatively an order that the first respondent be wound up on the basis that it is just and equitable that the first respondent be wound up;

(i) that the costs of this petition be provided for;

(j) for such further or other relief as this honorable court deems fit in the circumstances.

[6] After the conclusion of the trial, counsel for the petitioner, Mr Robert Lazar ('Mr Lazar') prayed for the following relief:

(1) That the allotment of shares on 20 March 1985 by the issue of 9240 shares in the first respondent in favour of GKN be cancelled and set aside;

(2) That the issued capital of the company be in the proportion of 6638 shares in favour of the petitioner and the second, third and fourth respondents equally;

(3) An injunction to restrain the second, third and fourth respondents from in any way disposing off or dissipating the assets of the first respondent and its subsidiaries until after the implementation of further orders to be made.

(4) For the appointment of a valuer to value the first respondent on a net tangible asset basis for the purposes of determining the value of the petitioner's shares; and that the parties be at liberty to apply in the event they are dissatisfied with the determination of the valuer.

(5) That the costs of the valuation to be undertaken be paid out of the assets of the first respondent.

(6) That the first respondent be ordered to undertake a reduction of capital in order for the petitioner's shares to be then cancelled and for the return of capital of the petitioner's 6638 shares equivalent to 25% of the net asset value of the company either in cash or in specie.

(7) Alternatively that the second, third and fourth respondents be ordered to purchase the petitioner's 6638 shares at the value to be determined by the valuer in the manner set out in (4) above.

(8) Failing which that the first respondent be wound up and that a Provisional Liquidator be appointed over the first respondent.

[7] In short, Mr Lazar is asking for three alternative relief orders, a capital reduction exercise in the first respondent, an order for the purchase of Peng Ann's shares in the first respondent by the younger brothers or an order that the first respondent be wound up.

[8] Peng Ann's grounds for his claims can be summarised as follows:

(1) From 1977 (the year he was not re-elected as chairman of the board of directors) until the presentation of this petition, he was excluded from the management of the first respondent despite the fact he was still a director. He was excluded by not being given notices of director's, extraordinary and annual meetings.

(2) The manner in which the merger between Wah Tat Bank Bhd and Chew Geok Lin Finance Sdn Bhd ('CGLF') was effected by the younger brothers and the use of the proceeds from the just mentioned merger to fund the 1982 rights issues to the first respondent.

(3) From the years 1987 to 1988, the younger brothers received RM2000 per annum each as director's fees while he was not given any.

(4) The sale of the land to one Wong Hieng Ling at an alleged price which was below the market value.

(5) A loan to Zenith-Mint Cinema Sdn Bhd ('ZMC'), cash donation of RM15,000 to Sibu Chiang Chuan Association, use of a vehicle by the third

respondent ('Peng Hui') for his law practice, non declaration of dividends, and expenditure of RM118,475 not connected to the first respondent's business.

(6) The loan of RM462,000 by A Minor Music Sdn Bhd to the first respondent and subsequently the issuance of convertible unsecured loan stock to GKN which was owned only by the younger brothers.

(7) The conversion of the unsecured loan stock on 20 January 1984 by the first respondent by way of an extraordinary meeting into 9240 shares in the first respondent to be issued to GKN.

(8) The issuance of another convertible loan stock for RM174,700 to GKN which on maturity would convert 3494 ordinary shares in the first respondent.

THE LAW

[9] Peng Ann's action is premised on s 181 of the CA('s 181') which states as follows:

181(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

[10] Lord Wilberforce's guidelines on this section in the case of *Re Kong Thai Sawmill (Miri) Sdn Bhd*: *Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 have been applied in our courts in many cases and are succinctly summarised in *Chan & Koh on Malaysian Company Law (2nd Ed)* at pp 729–730 as follows:

(1) First, the section is not a substitute for a minority shareholders' action and, specifically that many if not most of the matters complained of would properly form the subject of such an action. Merely because facts are established which would form a minority shareholders' action does not mean that relief can also be sought under s 181. This is because the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. However, if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action.

(2) Secondly, for a case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions with which the complainant does not agree, is not enough. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. There must be a visible departure from the standards of fair play which a shareholder is entitled to expect before a case of oppression can be made. Similarly, 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure. Either of them may be demonstrated by a course of conduct which in some identifiable respect, or an identifiable point in time, can be held to have crossed the line.

(3) Thirdly, the wording of s 181(1)(a),'are being conducted' and 'are being exercised' relates to a present state of affairs. The language in s 181(1)(a) may be contrasted with that of s 181(1)(b) which refers to an act of the company which 'has been done or is threatened'. What is attacked by s 181(1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under s 181.

[11] I also note the advice given by Gopal Sri Ram JCA in *Owen Sim Liang Khiu v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 at pp 128–129 on the guidelines of Lord Wilberforce which is:

> It is important to emphasise that much of what Lord Wilberforce said in his advice were mere guidelines and not inflexible propositions of law: for, the question whether there was oppression or disregard or unfair discrimination or whether the conduct complained of was 'otherwise prejudicial' is one that must eminently be determined according to the facts of each particular case.

APPLICATION OF THE LAW

[12] I shall now apply the law to the factual context of this case. The starting point of this saga in my view was the failure to re-elect or the removal of Peng Ann as the

chairman of the first respondent in 1977. From that point onwards the relationship of the Chew household was one of hostility. In the words of Peng Cheng, the second respondent, the relationship was 'very poor' and he also testified that at the 1982 meeting at Peng Ann's house, he was warned by Peng Hong, the fourth respondent, not to drink the tea as it may be poisonous. He of course later tried to play down this testimony by saying it was a joke. In my view, joke or no joke, the fact it was uttered shows emphatically that the relationship was far from cordial. The attitude of Peng Ann confirms the bad relationship. His attitude after 1977 was one of 'I could not care less what my three brothers did as long as they did not do anything to prejudice my interests in the first respondent and Wah Tat Bank Bhd.' Throughout his testimony he made it clear that 'all I wanted was my Wah Tat Bank Berhad's shares held by CGLF back in my personal name and they can do what they want with their shares'. In short he wanted to go his separate way.

[13] I shall now examine the grounds put forth by Peng Ann in this petition.

Ground 1: Exclusion from participation in the affairs of the first respondent

[14] Peng Ann' s main complaint here was that he was not given any notices of board meetings and as such was shut out from participating in the affairs of the first respondent. It is the contention of the younger brothers' counsel, Mr Chong Siew Chiang ('Mr Chong') at p 32 of his submission (encl 195) that 'the first respondent is a family company with only four shareholders and four directors. The affairs of the first respondent have been all along run informally since 1968. There had never been the practice of giving written notice of any meeting by the first respondent. As admitted by the petitioner himself, he did not even hold any meeting during his time of management from 1968 to 1976'. That being the case, the petitioner should be barred from making allegations of not receiving any written notices. Besides he was at all material times one of the directors of the first respondent and had taken no step to ensure that written notices be given to him of any meeting of the first respondent.

[15] With respect to Mr Chong, when the younger brothers continued the practice of not issuing written notices for meetings, they took a risk of being challenged and that risk came home to roost in this court action.

[16] Be that as it may, Peng Ann's conduct must be taken into account in considering this ground. Peng Ann was at all material times a director whose rights were the same as that of the younger brothers. It is undisputed that he did not do anything from 1977 to 1988, which is a span of 11 years. His stand of a 'couldn't care less' attitude in my view was his own doing and choice and as such, he cannot complain that he was excluded from participation in the affairs in the first respondent. He could have under s 167(3) and (4) of the CA inspected and taken the accounts of the first respondent. Not only did he not exercise that right, he also did not in writing complain about the non exclusion from exercising his duty as a director. He could have easily made his written request for written notice of meetings by giving the first respondent's secretary a letter and if he did not get a reply he could have continued writing. Looking at the evidence in its totality including the undisputed fact that Peng Ann was once a managing director of a bank which makes

him a well informed and experienced businessman, I believe what Peng Cheng said in para 9 of his affidavit dated 18 Janaury 1991 (p 142 of the bundle of pleadings) about Peng Ann's attitude which was:

> He refused to talk to us. He refused to attend all meetings of the bank and CGLF. He felt that without his presence the second, third, and fourth respondents would not be able to run the WTBB and CGLF, by depriving them of information which he had and keeping them in the dark generally about the operations of the WTTB and CGLF.

[17] One can also see from his testimony that after his removal as chairman from the first respondent, Peng Ann did not want to cooperate with the younger brothers in the running of the first respondent. In other words, there was no 'disregard of his rights' as far as this ground is concerned. I dare say that because of Peng Ann's attitude, the younger brothers were put in a spot when they could not include him in the management of the first respondent.

Ground 2: The manner in which the merger between Wah Tat Bank Bhd and CGLF was effected by the younger brothers and the use of the proceeds from the just mentioned merger to fund the 1982 rights issues by Wah Tat Bank Bhd to the first respondent.

[18] The manner in which the merger took place as described by Peng Ann was substantially undisputed by Peng Cheng (see paras 11.8–11.10 PW1-C). However I must confess that what they did was highly unusual but as I said earlier, the younger brothers were put in a tight spot in trying to ensure that the merger was carried out smoothly and that the rights issues from Wah Tat Bank Bhd were taken up. Be that as it may, Peng Ann had not shown how his financial interests in the first respondent had been adversely affected by this exercise by the younger brothers. In fact it is undisputable that Peng Ann had gained from the 1982 rights issues from Wah Tat Bank Berhad. For relief to be granted under s 181, the conduct of oppression must involve some prejudice to the member's pecuniary interests in the company, where as in the just mentioned merger there was none (see *Re Broadcasting Station 2GB Pty Ltd (1964–5) NSWR 1648*).

Ground 3: From the year 1987 to 1988, the younger brothers received RM2000 per annum each as director's fees while Peng Ann was not given any.

[19] The amount involved (RM167 per month director's fees) is so small that Mr Lazar conceded from the Bar that they are not pursuing this point. In any event, the fact that Peng Ann never complained immediately makes this ground a non starter.

Ground 4: The sale of the land to one Wong Hieng Ling (WHL) at an alleged price which was below the market value

[20] This transaction happened in 1982 and in his complaint, he ignored the fact that it was part of the deal in which WHL entered with the first respondent. That deal was this. WHL would purchase a half undivided share in lease 45882 for RM100,000 on the condition that WHL would lend to the first respondent the sum of RM330,000 interest free. The sum of RM330,000 was used to pay off the loan due to Wah Tat Bank Berhad. The bottom line of this deal was that Peng Ann again

was not able to prove how the younger brothers gained personally from it or how his interests in the first respondent had been prejudiced by the sale.

Ground 5: Loan to ZMC, cash donation of RM15,000 to Sibu Chiang Chuan Association, use of vehicle by the third respondent for his law practice, non declaration of dividends, expenditure of RM118,475 not connected to the first respondent's business.

[21] I agree with Mr Chong that these allegations save and except the non declaration of dividends by the first respondent, were not proved in court. In fact Peng Ann admitted to the signing of the memorandum of transfer of the piece of land donated to Sibu Chiang Chuan Association and had agreed to the donation. The loan to ZMC was in fact a capital contribution. Further the allegation against the Peng Hui's use of the car did not take into consideration of his status as a director of the first respondent and as such it was just a mere allegation with no specifics. The expenditure of RM118,475 was again a mere allegation. Peng Cheng during his cross examination was able to explain in details of the just mentioned amount. The non declaration of dividends is a non starter for the simple reason that the younger brothers also did not benefit from it. There was also no evidence in court to show that Peng Ann needed the dividend money for his or the family livelihood. All these unfounded allegations point to a conclusion.

Ground 8: The issuance of another convertible loan stock for RM174,700 to Geok Kheng Nominee Sdn Bhd (GKN) which on maturity would convert 3494 ordinary shares in the first respondent.

[22] This conversion never took place in view of an agreement between the parties after an application for an injunction was taken out by Peng Ann against the younger brothers. Be that as it may, the younger brothers' attempt to convert this loan stock is a factor which I will take into consideration in my deliberation. That Peng Ann in starting this petition may have a purpose other than seeking a remedy to rid himself of the alleged oppressions. I will later in my judgment deal with this point.

Ground 6: The loan of RM462,000 by A Minor Music Sdn Bhd to the first respondent and the subsequent issuance of convertible unsecured loan stock to GKN which was owned by only the younger brothers

Ground 7: The conversion of the unsecured loan stock on 20 January 1984 by the first respondent by way of an extraordinary meeting into 9240 shares in the first respondent to be issued to GKN.

[23] The effect of the conversion of the unsecured loan stock on 20 January 1984 by the first respondent ('the conversion exercise') was the dilution of Peng Ann's shareholdings in the first respondent from 25% to 18.5% with the shareholdings of the younger brothers increasing from 75% to 81.5%. This dilution in anyone's language had adversely affected Peng Ann's pecuniary interests in the first respondent. This is not disputed by the younger brothers but defended on the grounds that Peng Ann had known of the conversion exercise and they had invited him to become a shareholder in GKN before and even after the conversion exercise. Further, it was contended by Mr Chong that the conversion exercise was done with the best of

intentions and for the benefit of the first respondent. The mechanics in implementation of the exercise can be seen from pp 67–69 of PW 1A which are produced below:

CHEW BROTHERS DEVELOPMENT CORPORATION SDN BHD
Minutes of the Extra-ordinary General Meeting of the Company held at the Registered office at No. 15 Bank Road, Sibu on 25th June, 1983 at 2 p.m.

Present: Chew Peng Hui Chairman Chew Peng Cheng Chew Peng Hong

Issue of convertible unsecured Loan Stock That the Directors be and are hereby authorised to borrow a sum of M$ 462,000 from GEOK KHENG NOMINEE SDN. BHD. (hereinafter referred to as 'The lender') and that the Company do hereby issue $462,000 Convertible Loan Stock 1984 to the lender maturing on 31 December, 1984. Upon maturity of such Loan Stock, the Company will allot and issue to the lender 9,240 ordinary shares of $50 each credited as fully paid and such allotment and issue shall be in satisfaction of the principal moneys in respect of the Loan Stock so converted. That shares issued and allotted upon conversion of the Loan Stock will rank pari passu in all respects with the existing shares of theCompany. Dated this 25th of June, 1983.

Confirmed by Signed …….. Chairman (Page 67 exhibit PW1 – A)

CHEW BROTHERS DEVELOPMENT CORPORATION SDN BHD
Minutes of the Extra-ordinary General Meeting of the abovenamed Company held at the Registered office at No. 15 Bank Road, Sibu on 20th January, 1984 at 10:00 a.m.

Present: MR CHEW PENG CHENG DR. CHEW PENG HUI DR. CHEW PENG HONG

M$462,000 Convertible Loan Stock maturing on 31st December 1984 It was RESOLVED: That upon maturity of the $462,000 Convertible Loan Stock issued to GEOK KHENG NOMINEE SENDIRIAN BERHAD pursuant to the Extra-Ordinary General Meeting of 25th June, 1983, a copy of which is appended herewith for information, the entire amount of the said Loan Stock shall be converted into 9,240 Ordinary Shares of M$50 each of the Company and That the Directors of the Company be and are hereby authorised to allot and issue to holder of the Loan Stock, GEOK KHENG NOMINEE SENDIRIAN BERHAD, 9,240 Ordinary Shares of M$50 each credited as fully paid up, such allotment and issue shall be in satisfaction of the principal moneys in respect of the Loan Stock so converted and that such shares issued and allotted will rank pari passu in all respects with the existing shares of the Company Termination There being no other business, the meeting terminated at 11:00 a.m. Dated this 20th day of January, 1984

Confirmed by Signed CHEW PENG CHENG (Page 68 exhibit PW1 – A)

CHEW BROTHERS DEVELOPMENT CORPORATION SDN BHD
Minutes of the Board of Director's Meeting of the Company held at the Registered office at No. 15 Bank Road, Sibu on 20th March, 1985 at 2 p.m.

Present: Chew Peng Hui Chairman Chew Peng Cheng Director Chew Peng Hong Director

> ALLOTMENT OF SHARES That the following official allotment of shares at par of M$50 each pursuant to the authority given by the Extra-ordinary General Meeting dated 25th June, 1983 and 20th January, 1984 be and are hereby approved:
>
> ALLOTTEE NO. OF SHARE 9,240 Geok Kheng Nominee Sdn. Bhd.
>
> And that authority be and is hereby given for the Common Seal of the Company to be affixed onto the share certificate to be issued in respect of the above allotment in accordance with the Company's Articles of Association. Dated this 20th day of March, 1985
>
> Confirmed by Signed Chew Peng Cheng Director (Page 69 exhibit PW1 – A)

[24] Mr Lazar submitted that this conversion exercise together with the other grounds listed earlier amounted to oppression in law under s 181 and urged this court to grant the relief as set out in his submission.

[25] Before I consider Mr Lazar's contention, in my mind we should first address the issue of whether the just mentioned meetings were carried out properly. To address this issue, one must look at the relevant provisions of the Article of Association of the first respondent and they are as follows:

[26] Article 43 of the article of association ('article 43') reads as follows:

> Subject to the provisions of the Act relating to Special Resolutions and agreements for shorter notice fourteen days' notice at the least specifying the place, the day and the hour of meeting, and in the case of special business general nature of such business shall be given in manner hereinafter mentioned to such persons as are under the provisions of these Articles entitled to receive notices of general meetings from the company, but with the consent of all persons for the time being entitled as aforesaid, a meeting may be convened upon a shorter notice, and in such manner as such persons may approve. The accidental omission to give such notice to, or non receipt of such notice by any person shall not validate the proceedings of any resolution passed at such meeting.

[27] Article 108 (p 211 BP) of the article of association ('article 108') reads as follows:

> A notice may be given by the Company to any member either personally or by sending it by post to him at his registered address, or (if [h]e has no registered address within Malaysia) to the address, if any, within Malaysia supplied by him to the Company for the giving of notices to him. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, preparing, and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting on the day after the date of its posting, and in any other case at the time at which the letter would be delivered in the ordinary course of post

[28] Article 111 of the article of association ('article 111') reads as follows:

Notice of every general meeting shall be given in any manner hereinbefore authorized to

(a) every member;

(b) ...

(c) ...

[29] Mr Chong had submitted that article 108 permits the issuance of oral notices which in his view has been proved by the evidence of the Peng Cheng. With respect, I do not agree. It is my view that the notice in Article 108 must mean written notice because of the way it was framed. The use of the word 'it' (17th word) after the word 'sending' must refer to the word 'notice' (2nd word) which must be written for the simple reason that one cannot send an 'oral' notice by post. It is conceded by Mr Chong that no such written notice was given to Peng Ann in respect of the just referred meetings. My conclusion is fortified by article 43 which requires a notice for a special resolution (which we are concerned here) to 'specify the place, the day and the hour of meeting, and in the case of special business general nature of such business'. Even if I agree with Mr Chong that oral notices are permitted, there is no evidence to show that the nature of business to be transacted was told to Peng Ann.

[30] What then is the consequence of this failure by the younger brothers to give proper notices for the meetings mentioned earlier?

[31] In my mind this breach of articles 43, 108 and 111 cannot be regarded as a mere technicality for the simple reason that it involved a dilution of Peng Ann's shareholdings in the first respondent. In *Young v Ladies Imperial Club Ltd* [1920] 2 KB 523, the English Court of Appeal dealt with a similar issue and this is how Warrington LJ put it:

> There is only one question we have to determine, that is to say whether the executive committee of the club, who for this purpose represent the defendants, acted properly in erasing the name of the plaintiff from the list of members of the club in accordance with the rule by which their conduct as a committee is governed.
>
> The matter is, to my mind, not a mere irregularity, especially as it involves the question whether or not the vexation, and perhaps something worse, should be imposed upon a member of having her name erased from the list. It seems to me great importance that rules which have been made for the purpose of regulating the proceedings of the committee in respect of such a matter ought to be strictly adhered to …

[32] The just quoted case was followed by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chung Ching Chuen & Ors* [1995] 3 CLJ 639.

[33] Accordingly, the Extraordinary General Meetings of the first respondent held on 25 June 1983 at 2 pm and 20 January 1984 at 10 am and the Board meeting of the first respondent dated 20 March 1985 were invalid.

[34] Mr Chong in anticipation of my finding submitted that the court should exercise its discretion under s 355(1) and (2) of the Companies Act which reads as follows:

355. Irregularities in proceedings

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

(2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

[35] In view of my finding that the dilution of Peng Ann's shareholdings is not a mere irregularity, I decline Mr Chong's offer to exercise my discretion.

[36] With that finding, I deal now with the issue whether or not the younger brothers' conducts amount to oppression under s 181. Mr Lazar in his submission contended as follows:

17.4 On the question of the dilution the learned Judge in *Re A Company* said this at p 395 (p 54 of PBA):

Indeed, I cannot conceive of a more blatant case of unfairly prejudicial conduct to a member than the unilateral and secret exercise by a director of the power of allotment so as to increase his own shareholding from 60% to 96% and to reduce the other members holdings thereby from 40% to 4%.

17.8 It is however not just a dilution that we contend forms the basis of this Petition. It is the overbearing and oppressive attitude of the respondents. That is manifested itself not only in the dilution but in the way in which they conduct the affairs of the company, as if the petitioner does not exist. That is clearly shown by the decisions that they have taken and the fact that they do not even give notice to the petitioner. One clear example of the overbearing and exclusionary attitude is the declaration of directors' fees for the years 1986, 1987 and 1988. Very conveniently only the second, third and fourth respondents received such fees. The petitioner was clearly excluded when it is clear that all directors are entitled to fees if declared. The fact that the quantum of these payments may have been small does not in any way diminish the significance and arrogance of the respondents, on the contrary they show up these respondents to be the kind of people they are, that for such amounts they are prepared to treat the petitioner so shabbily. Further, there is also clear evidence that personal relationship between the respondents and the petitioner are non-existence. All these we submit is cause for intervention under s 181 for this Court to terminate the unsatisfactory state of affairs prevailing in the first respondent.

[37] There is no doubt in my mind that the conversion exercise and the attempted conversion of convertible loan stock for RM174,700 to GKN (which on maturity would convert 3494 ordinary shares in the first respondent) are important factors to consider but I am required by law to look at the whole scheme of things to determine whether there are oppressive conducts by the younger brothers. So applying that approach I now look at the facts. To recap, the relationship of Peng Ann and his younger brothers had become bad after the removal of Peng Ann as chairman of the first respondent in 1977. In fact the evidence shows that the relationship had become worse as time went by and I say that because Peng Ann had lodged a police report against Peng Cheng when certain cheques from the disposal of CGLF's shares in Wah Tat Bank Berhad were not given to him and his family member. And when a brother

is willing to lodge a police report against one's own brother, one can reasonably conclude that the relationship had become irreparable. Peng Ann since 1977, as stated earlier, had wanted 'to go his own way' and in my view the conversion exercise provided him the first chance to fulfill that wish. Further it is also my finding that his real and only complaint is the conversion exercise and not that he had been continuously oppressed by his younger brothers in the affairs of the first respondent. As far as the other complaints, they were lumped in together to buttress his case with the hope that the court will fulfill his desire 'to go his own way' by either getting the court to order a reduction of capital exercise of the first respondent or the purchase of his shareholdings in the first respondent by the younger brothers or the 1 respondent be wound up. This is the hidden agenda of Peng Ann when he launched this petition as he had nothing to complain about the management of the first respondent. This is also borne out by the fact that the reliefs asked for now by Mr Lazar did not include prayers (a) and (b) contained in the petition which concerned the taking of all the necessary accounts and inquiries of the first respondent's affairs and each of the younger brothers to ascertain what sums of money due from their breach of duties to the first respondent and the refund of the younger brothers' director's fees to the first respondent.

[38] My view of Peng Ann's hidden agenda is also clearly shown by his evidences (p 49–50 NOP) which I reproduce here:

> Put: That your allegation of mismanagement of the first respondent by the second, third and fourth respondent was untrue. Do you agree?
>
> A: I did not allege that they mismanaged the first respondent; I only said that they were unfair to me.
>
> Q: Therefore, your allegation of mismanagement on paragraph 38.8 at page 45 and paragraph 15(e) at page 291 were untrue. Do you agree?
>
> A: What I meant was, they had been unfair to me and caused the dilution of my shareholding in the first respondent. (line 11-20 NOP).
>
> Q: In your new affidavit (paragraph 15) as at 30 December 2005 the assets of Chew Brothers was RM80 million. And do you agree that from that figure, it shows that the investment of 4615 of the Wat Tatt Bank shares and subsequent right issues was a correct decision?
>
> A: I do not agree because my share in first respondent was diluted.
>
> Q: Do you agree with me that without the investment in Wah Tatt bank through the purchase of its various right issues shares, the Chew Brothers asset will not worth about RM80 million?
>
> A: My complaint is that my shares in the first respondent have been diluted.

[39] Further from the testimony of both Peng Ann and Peng Cheng, one can easily surmise that both Peng Ann and the younger brothers want to go their separate ways for the simple reason that relationship between them is now beyond repair but is this 'a reason in law' for this court to conclude that there is oppression? The law is quite clear and I can do no better than to refer to Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company*Aerial Product Industries Sdn Bhd v Leong Kon Fah*

& Ors [2007] 1 MLJ 508 where the Court of Appeal at p 527 said: Though I believe that the appellant has lost confidence with the first and second respondents and vice versa I am of the opinion that the substratum of the company is still intact. The company ontinues to operate as an entity separate and distinct from its shareholders. As an ongoing profitable enterprise there is no reason why the court should order it to be wound-up or force one shareholder to buy out the other just because one does not like the other. Without the appellant as a director API is, relatively speaking, well managed and this is manifested by the rather substantial dividends dished out from time to time to shareholders for their investments. Under these circumstances there is no justifiable reason why the court in exercising its judicial discretion, based on just and equitable rule, should accede to the demands of the appellant particularly when there is cogent evidence that he did not come with clean hands (see *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492) at p 507.

[40] For all the reasons stated above, I find that Peng Ann had failed to make out a case under s 181.

[41] What then is my option? Mr Lazar submitted that even if Peng Ann had failed to make out a case under s 181, the court can still exercise the power provided for in s 355(3) of the CA ('s 355(3)'). Mr Chong submitted to the contrary. With respect, I disagree with Mr, Chong as the court's power is clearly set out in s 355(3) which reads as follows:

> (3) Without affecting the generality of subsections (1) and (2) or of any other provision of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to s 257, the Court
>
> (a) *may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;*
>
> (b) shall, before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;
>
> (c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and
>
> (d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

[42] However before I decide whether or not to exercise my discretion under s 355(3), I shall deal with the issue of laches on the part of Peng Ann in coming to court. It was of course Mr Chong's submission that there was no explanation of the

delay and relying on the case *Re Stenson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 and *Low Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd* [2000] 5 MLJ 529 he urged the court not to set aside the conversion exercise. Peng Ann's explanation was that he did not find out about this conversion exercise until sometime in 1988 and I believe him for the reason that in the circumstances of this case, it would not be reasonable to conclude that Peng Ann would accept gracefully the dilution of his shareholding in the first respondent. In any event I agree with Mr Lazar that even if there were laches on the part of Peng Ann, there must be acquiescence by him which I cannot find. This principle of law is lucidly stated in the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 by Edgar Joseph J (as he then was):

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 Halsbury's Laws of England (3rd Edn) paras 1181, 1182. Laches has been succinctly described as 'inaction with one's eyes open'.
>
> Now, can lapse of time and delay, however gross, in a suit seeking final, as opposed to interlocutory relief, of itself amount to the equitable defence of laches. It is clear that delay in some circumstances can amount to evidence from which the inference can be drawn that the plaintiff has released (or waived, there seems to be no difference) the claims which he asserts: lapse of time always gives rise to a presumption that a stale suit is ill-founded; for a reasonable man is not likely to sleep on his claims if they are well-founded. Whether it does or does not is a question of fact in each case.
>
> It is possible to point to a number of cases in which plaintiffs have been successful in spite of spectacular delays. In England, in *Burroughes v Abbott* [1922] 1 Ch 86, rectification of an instrument was granted after a delay of 12 years; in *Weld v Petrie* [1929] 1 Ch 33 the Court of Appeal held that a mortgagor's redemption suit was not barred by a delay of 26 years and in *Pickerring v Lord Stamford* (1795) 30 ER 787, it was held that after a delay of 35 years, a portion of a testator's residuary estate which had been devoted by ten trustees of the testator's will to charity was really held by them on trust for the testator's next of kin. In Australia, a decree of specific performance was granted by the High Court in *Fitzgerald v Masters* [1956] 95 CLR 420, 26 years after the cause of action arose and in *Bester v Perpetual Trustee & Co Ltd* [1970] 33 NSWR 30, Street J rejected a defence of laches where a plaintiff waited 20 years before commencing a suit to rescind a transaction on grounds of undue influence. (Emphasis added)

[43] As there was no acquiescence to the conversion exercise on the part of Peng Ann, his 'couldn't care less' attitude in respect of the affairs of the first respondent is not a factor which I take into account in my deliberation on whether to set aside the conversion exercise.

[44] For all the reasons stated above, I dismiss this petition with costs to be taxed unless agreed to the younger brothers. However, I exercise my power under s 355(3) and set aside the conversion exercise and further order that the first respondent repay the sum of RM462,000 to GKN together with interests at the rate of 4% per annum from 23rd March 1985 (date of actual conversion) to the date of judgment and thereafter statutory interest of 8% per annum until the full payment of the RM462,000. In respect of my order made pursuant s 355(3), I make no order as to costs for the reason that Peng Ann could and should have easily sought a declaration from the court that the conversion exercise was invalid for reasons as stated earlier. Instead he chose the s 181 route to pursue his hidden agenda.

[45] Finally in exercising my discretion under s 355(3), I am also mindful of the fact that GKN is not a party to this suit. Be that as it may, it is of no consequence as GKN are solely owned by the younger brothers and cannot be treated as a 'bona fide party without notice of the invalid act'.

[46] I now will deal with suit 68/93.

SUIT 68/93

Claims

[47] The claims of the younger brothers against Peng Ann as defendant are as follows:

(1) (a) An order directing the defendant to transfer to the plaintiffs 7500 of his WTBB shares at the price of RM196 per share and the 1125 shares at the price of RM100 per share upon full payment by the plaintiffs of respective prices thereof to the defendant. (b) An order ordering the defendant to pay or account to the plaintiffs the amount as set out in para 5(5)(iv)(a) and (b) hereinbefore. (c) Further and in the alternative, the defendant be ordered to pay to the plaintiffs the special damages particularised in para 5(5)(i)–(iv).

(2) General damages.

(3) The defendant, whether by himself his servants, agents, proxies or any of them or howsoever otherwise be restrained by injunction until the trial of this action or until further order from doing any or all of the following acts:

(a) parting with the possession or selling or disposing of or dealing in any manner whatsoever with the 8265 shares in WTBB; and or

(b) exercising any rights including voting rights attached to the said 8625 shares in WTTB.

(4) Further any other relief as this honorable court may deem fit and just and proper.

(5) Costs.

ISSUE

[48] The issue is whether there was a binding oral agreement between Peng Ann and the younger brothers in respect of a transfer of 7500 of Wah Tat Bank Berhad shares by Peng Ann to an intended bumiputra shareholder?

THE YOUNGER BROTHERS' CASE

[49] In a nutshell, Peng Ann in the 1982 meeting at his house had orally agreed that all the four brothers are to individually come out with 7.5% to make up the sale of 30% shareholdings in Wah Tatt Bank Bhd to an intended bumiputra shareholder to comply with National Economic Policy (NEP) and the task of negotiating for the price of the shares and seeking out for the intended bumiputra was left in the hand of the Peng Cheng. Peng Ann breached that oral agreement when he refused to transfer 7500 shares.

[50] Mr George Lim ('Mr Lim'), counsel for the younger brothers, submitted that his clients' version of the events was more credible and he set out ten reasons why. In brief they are these. Firstly, it was not disputed by Peng Ann that the NEP requirement of 30% bumiputra shareholdings in Wah Tat Bank Berhad had to be complied with. Secondly, Peng Ann at no time specifically said that he would not comply with the NEP requirement and if he had the 1982 meeting would have broken up abruptly. Thirdly, it was the wish of their late father that all four brothers are to have equal shareholdings in Wah Tat Bank Berhad and first respondent.

PENG ANN'S CASE

[51] Again in a nutshell, there could not have been an agreement as alleged as he at no time was told of the price of the shares and the names of the intended bumiputra shareholder.

[52] Mr Steven Chung ('Mr Chung'), counsel for Peng Ann, in summary relied on the following to advance his client's case. Firstly, he submitted that how could there be an agreement when Peng Ann was not privy to the discussions of the sale price and the identity of the intended bumiputra. Secondly, there was no credible explanation why the younger brothers did not use Wah Tat Bank Berhad shares held by the first respondent to satisfy the NEP requirement. Thirdly, the 1982 meeting only concerned the merger of CGLF and Wah Tat Bank Berhad and this was evidenced by the undisputed fact that Peng Ann and his family members signed all the relevant transfer forms. Fourthly, the younger brothers acted on their volition to sell the shares to the bumiputra shareholders.

APPROACH OF THE COURT

[53] What I have before me are two sets of oral testimony, one contradicting each other and the court is put in a situation of deciding whom to believe in the absence

of any documentary evidence. I was put in a similar situation in *Yii Chee Ming v Teo Ah Khing @ Teo Cho Teck & Anor* and this is what I said:

> In dealing with such a situation, I ask myself the question 'which version of the events is more reasonable in the circumstances of the case' and in coming to my conclusion, I was guided by what was said in *Tindok Besar Estate Sdn Bhd v Tinjar Company* [1972] 2 MLJ 229 by Chang Min Tat J at p 230:
>
> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.
>
> And also what is stated in the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 116 where the Court of Appeal held as follows:
>
> 'A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.'

[54] It is trite law that for an agreement, oral or otherwise, to be concluded three certainties, namely, the parties, the price and the property, must be established. (see *Kassim Holdings Sdn Bhd v Syarikat Gaya Timber Sdn Bhd Kota Kinabalu* (unreported; Suit No K22–141–2003).

[55] It is not disputed by Mr Lim that at the 1982 meeting the intended bumiputra shareholder and the sale price had not been established. Not only that, to agree with Mr Lim's submission that there was a concluded agreement would mean a finding of fact by me that Peng Ann at the 1982 meeting had a change of heart as far as his relationship with his brothers was concerned. This would be inconsistent to the factual context. The reality was that he did not trust the younger brothers and vice versa. The three suits herein bear testimony to that reality. It is inconceivable that Peng Ann would leave all the negotiations to the younger brothers to deal with his Wah Tat Bank Berhad shares. In my view, Peng Ann never forgave his younger brothers for his removal as chairman of the first respondent. In the circumstances, I find Peng Ann's evidence that 'he had no objection to the sale of his Wah Tat Bank Berhad shares but subject to his concurrences of the sale price and the identity of the intended bumiputra shareholders' more credible. Accordingly I hold that there was no concluded agreement between Peng Ann and the younger brothers.

[56] Even assuming that I was wrong in holding that there was no concluded agreement, the younger brothers' claims are in any event time barred. The relevant limitation period is three years as provided for in *item 93* of the *Sarawak Limitation Ordinance* and the period starts to run 'when the contract is broken'.

[57] Mr Lim submitted that time did not start to run until in 1993 when suit 29/93 was filed by Peng Ann to recover the non banking assets. This submission is based on the assertion that Peng Cheng only realized that Peng Ann was not going to honor his part of the alleged agreement when he filed suit 26/93. Mr Chung refutes that argument.

[58] The assertion of Mr Lim with respect is not credible and my reasons are these. Firstly, the relationship between Peng Ann and the younger brothers since 1977 had gone from bad to worse. Secondly in 1986, Peng Ann had complained about the transfer of those assets from the bank to Wah Tat Realty Sdn Bhd and in fact sought the good office of Datuk Wong Soon Kai to resolve the matter. This is what transpired at the meeting (NOP p 35):

Q: Am I correct that Datuk Wong Sung Kai arranged a meeting between the 4 of you in his house in end of 1986?

A: Yes

Q: And at that meeting, the Defendant asked for return of his ¼ shares, isn't it?

A: Yes. He actually asked Datuk Wong Sung Kai to transfer back the ¼ share to him personally.

Q: So he was clear and firm that he wanted his ¼ share back, isn't it?

A: Yes

[59] The fact that there was this meeting shows conclusively that Peng Ann had all along wanted his share of the non banking properties in Wah Tat Bank Berhad to be transferred to him. Hence if there was an alleged breach, it would be in 1986 and since the suit only commenced in 1993, the younger brothers' claims are barred by item 93 of the Sarawak Limitation Ordinance.

UNJUST ENRICHMENT

[60] Mr Chung refers the court to Goff & Jones on the Law of Restitution (6th Ed) which explains the concept of 'unjust enrichment' in the following manner:

> It presupposes three things. First, the defendant must have been enriched by the receipt of a benefit. Secondly, that benefit must have been gained at the plaintiff's expense. Thirdly, it would be unjust to allow the defendant to retain that benefit. These three subordinate principles are closely interrelated and, and cannot be analysed in complete isolation from each other. Examination of each of them throws much light on the nature of restitutionary.

[61] I do not think that there is any doubt that what is stated by the learned authors represents the law.

[62] At first glance, Mr Lim's submission at pp 13–25 of encl 148, I must admit, is an attractive one bearing in mind that the litigants' late father had wanted all his sons to have equal shares in the family companies set up by them. It was then only fair that Peng Ann should come out with his 7.5% portion of shares in Wah Tat Bank Berhad to comply with the 30% bumiputra equity holding in Wah Tat Bank Berhad. I would have no problem with that assertion if there were no other legal suits between the parties. It must be remembered that there are three cases before me and I must take into account of the facts of the other two cases in coming to a decision.

[63] This father's wish in my view started to lose its significance in 1977. And as far as Peng Ann was concerned, it was no more a consideration for him as far as his dealings with his brothers are concerned. As I have stated earlier, he had not forgiven his brothers for removing him as chairman of the first respondent in 1977. His demeanour in court when giving evidence bore testimony to that. Similarly for me the father's wish is not a factor which I take into account in my deliberation on this issue.

[64] When one talks of unjust enrichment, one party must have suffered from it. If I only look at the non contribution of the Wah Tat Bank Berhad shares by Peng Ann to comply with the NEP, I would agree that the younger brothers had been unfairly treated and it would be unconscionable for Peng Ann to keep the benefit. But I must look at the totality of evidence before me and that means I have to take into account the facts in suit 26/1993 even though that case had been disposed off by the Court of Appeal. The undisputed fact from suit 26/1993 was that the younger brothers had gained from the transfer of the non banking assets in Wah Tat Bank Berhad to Wah Tat Realty Sdn Bhd which is a company owned solely by the younger brothers. The properties were transferred at book value of RM803,099 when the undisputed book value was RM2.4 million which prompted Charles Ho J in that suit to conclude as follows:

> By passing a resolution transferring the seven landed properties at book value to the Company wholly owned by the three of them (meaning the Plaintiffs in this suit), the first, second and third Defendants (meaning the Plaintiffs in this suit) had undoubtedly benefited themselves to the tune of about RM1.6 million which would represent a loss to the fifth Defendant (meaning the Bank) in the same amount.

[65] With this benefit, it would be unconscionable to say that the younger brothers had suffered. Whatever they may have lost from the non contribution of Wah Tat Bank Berhad shares by Peng Ann, they have been compensated from the gain resulting from the transfer of the non banking assets to Wah Tat Realty Sdn Bhd. Accordingly, I reject this contention of unjust enrichment.

[66] Finally, let me say that there is little doubt in my mind that suit 68/1993 was filed by the younger brothers in retaliation to Peng Ann's suit 22/1993. My reasons for saying that are these. Prior to suit 22/1993 there was no cause to complain on the part of the younger brothers as the non banking assets in Wah Tat Bank Bhd had already been transferred to a company owned only by them and whether or not Peng Ann was willing to transfer his 7,500 Wah Tat Bank Bhd shares to comply with the

NEP was not a concern. In another words, Peng Ann's failure to transfer in the minds of the younger brothers was compensated by the gain from the transfer of the non banking assets to Wah Tat Realty Sdn Bhd. The mediation in 1986 by Datuk Wong Soon Kai had failed despite the fact that it was agreed by their own pleadings that the non banking assets were supposed to be transferred to a company to be owned by the four brothers (see para 4(e) of the amended statement of claim) and the reason was simply that at that time they did not have a concluded agreement with Peng Ann in respect of his contribution of Wah Tat Bank Berhad shares to comply with the NEP.

[67] In view of my findings, it is not necessary for me to deal with the allegation of fraud by the younger brothers.

[68] For all the reasons stated above, I dismiss the younger brothers' claim with costs to be taxed unless agreed to Peng Ann.

Petition dismissed with costs.

Reported by Brendan Navin Siva